

## **REMARKS**

This paper is filed in response to the Office Action dated August 17, 2004. As this paper is filed on November 17, 2004, the paper is timely filed.

### **I. Status of Amendments**

Claims 1-9, 11-22, 28-40, 42-51 and 53-55 were pending prior to this response. None of the claims are amended by this response. Thus, claims 1-9, 11-22, 28-40, 42-51 and 53-55 are presently pending.

### **II. Response to the August 17 Office Action**

In the August 17 Office Action, claims 1-9, 11-22, 28-40, 42-51 and 53-55 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting over claims 53-72 of co-pending Application No. 10/027,888 ("the '888 application"). In this regard, applicant notes that a Notice of Allowance was issued on September 24, 2004 in regard to claims 53-72 of the '888 application.

In response, applicant has submitted herewith a Terminal Disclaimer. Thus, the rejection should be withdrawn.

It should be noted that the filing of the terminal disclaimer is not an admission as to the propriety of the double patenting rejection, as also set forth in Section 804.02 of the M.P.E.P., a portion of which is quoted below:

The filing of a terminal disclaimer to obviate a rejection based on nonstatutory double patenting is not an admission of the propriety of the rejection. *Quad Environmental Technologies Corp. v. Union Sanitary District*, 946 F.2d 870, 20 USPQ2d 1392 (Fed. Cir. 1991). The court indicated that the "filing of a terminal disclaimer simply serves the statutory function of removing the rejection of double patenting, and raises neither a presumption nor estoppel on the merits of the rejection."

M.P.E.P., Section 804.02; see also *Ortho Pharmaceutical Corp. v. Smith*, 22 U.S.P.Q.2d 1119 (Fed. Cir. 1992). Consequently, the fact that the applicants do not address the substance of the double patenting rejection should not be construed as an admission of the correctness of

the double patent rejection or that the applicant agrees with the statements made in support of the rejection.

## **II. August 24 Information Disclosure Statement**

Applicant notes that an Information Disclosure Statement was filed in this application and in the '888 application on August 24, 2004. Examiner Sager returned the initialed PTO-1449 (modified) along with the Notice of Allowance, indicating that he had reviewed the reference cited therein.

In view of the foregoing, it is respectfully submitted that the above application is in condition for allowance, and reconsideration is respectfully requested. If there is any matter that the Examiner would like to discuss, the Examiner is invited to contact the undersigned representative at the telephone number set forth below.

Date: November 17, 2004

Respectfully submitted,

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